No. S284498

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

DANA HOHENSHELT,
Plaintiff and Petitioner,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent,

and

GOLDEN STATE FOODS CORP.,
Defendant and Real Party in Interest.

After a Decision by the Court of Appeal,
Second Appellate District, Division Eight, Case No. B327524

Los Angeles Superior Court
Case No. 20PSCV00827, The Honorable Thomas Falls, Presiding

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CALIFORNIA CHAMBER OF COMMERCE, THE RESTAURANT LAW CENTER, AND CTIA—THE WIRELESS ASSOCIATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND REAL PARTY IN INTEREST

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APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE CALIFORNIA CHAMBER OF COMMERCE, THE RESTAURANT LAW CENTER, AND CTIA—THE WIRELESS ASSOCIATION FOR PERMISSION TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANT AND REAL PARTY IN INTEREST

To the Honorable Patricia Guerrero, Chief Justice:

The Chamber of Commerce of the United States of America (the "Chamber"), the California Chamber of Commerce (the "CalChamber"), the Restaurant Law Center (the "Law Center"), and CTIA—The Wireless Association ("CTIA") respectfully move for leave to file a brief as *amici curiae* in this matter in support of defendant and real party in interest Golden State Foods.*

The Chamber is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community, including cases

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* Pursuant to Rule 8.520(f)(4), *amici* affirm that no party or counsel for a party in the pending appeal authored the proposed *amici curiae* brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than *amici*, their members, and their counsel.

involving the interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

CalChamber is a non-profit business association with approximately 13,000 members, both individual and corporate, representing 25% of the state's private sector workforce and virtually every economic interest in the state of California. While CalChamber represents several of the largest corporations in California, 70% of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

The Law Center is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest private employer in the United States. In addition, members of the California Restaurant Association are automatic members of the Law Center. In the state, our industry is the largest private employer with 1,826,600 restaurant and foodservice jobs. Despite the industry's size, 96% of restaurants in California have fewer than 50 employees. Through *amicus* participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Law Center's

amicus briefs have been cited favorably by state and federal courts.

CTIA represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless providers, device manufacturers, suppliers, as well as application and content companies.

Many of the *amici*'s members and affiliates regularly rely on arbitration agreements in their contractual relationships. Based on the policy reflected in the FAA, *amici*'s members and affiliates have structured millions of contractual relationships around the use of arbitration to resolve disputes.

Amici's members and the broader business community have a strong interest in a judicial determination that the Federal Arbitration Act preempts California's Senate Bill 707, which is therefore unconstitutional under the Supremacy Clause of the Constitution.

In addition, the Chamber and CalChamber were two of the plaintiffs in a federal-court preemption challenge to a sister anti-arbitration law passed during the same session, Assembly Bill 51. In that case, Chief Judge Mueller of the United States District Court for the Eastern District of California issued a preliminary injunction against California's enforcement of AB 51 as applied to arbitration agreements governed by the Federal Arbitration Act, and the Ninth Circuit affirmed—leading to a stipulated permanent injunction. *See Chamber of Commerce v. Bonta* (9th Cir. 2023) 62 F.4th 473.

SB 707 is just as clearly preempted as AB 51. It unlawfully singles out arbitration agreements for disfavored treatment by subjecting their drafters to unique and one-sided sanctions if they do not pay arbitration fees in full within 30 days of the due date, regardless of the reason for non-payment or the amount not paid. And the consequent deterrent effect of those sanctions on the use and enforcement of arbitration agreements—an *explicitly stated* purpose of the California Legislature in passing SB 707—stands as an obstacle to the Federal Arbitration Act's pro-arbitration objectives, threatening to deprive businesses, workers, and consumers alike of the benefits of the national policy favoring arbitration. *Amici* therefore have a strong interest in participating in this case and expressing their perspective on why the Federal Arbitration Act preempts SB 707, just as it preempts AB 51.

CONCLUSION

The Court should grant this application and permit the Chamber, CalChamber, Law Center, and CTIA to file an *amici curiae* brief.

s/ *Archis A. Parasharami*

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

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the industry's size, 96% of restaurants in California have fewer than 50 employees. Through *amicus* participation, the Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry.

CTIA – The Wireless Association ("CTIA") represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless providers, device manufacturers, suppliers, as well as application and content companies.

Amici and their members have a strong interest in this case. Many of the *amici*'s members and affiliates regularly rely on arbitration agreements. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court.

SB 707 unlawfully singles out arbitration agreements for disfavored treatment by subjecting their drafters to unique and one-sided sanctions if they do not pay arbitration fees in full within 30 days of the due date, regardless of the reason for nonpayment or the amount not paid. And the consequent deterrent effect of those sanctions on the use and enforcement of arbitration agreements—an *explicitly stated* purpose of the California Legislature in passing SB 707—stands as an obstacle to the Federal Arbitration Act's pro-arbitration objectives, threatening to

deprive businesses, workers, and consumers alike of the benefits of the national policy favoring arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

A century ago, Congress enacted the Federal Arbitration Act to reverse hostility to arbitration. The FAA's principal substantive provision, Section 2, directs state courts and legislatures to "place arbitration agreements 'on equal footing with *all other contracts*.'" *Kindred Nursing Centers Ltd. P'ship v. Clark* (2017) 581 U.S. 246, 248 (emphasis added). The U.S. Supreme Court has further admonished courts to "be alert to new devices and formulas" impermissibly "declaring arbitration against public policy." *Epic Sys. Corp. v. Lewis* (2018) 584 U.S. 497, 509 (quotation marks omitted).

Nonetheless, the California Legislature and some courts applying California law have sought to restrict arbitration as a matter of state public policy, particularly in the consumer and employment contexts, and the U.S. Supreme Court has repeatedly held that the FAA preempts those efforts.[1] SB 707, which applies to consumer and workplace arbitration agreements,

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[1] *See*, *e.g.*, *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 659-62 (California judicial rule prohibiting division of PAGA actions into individual and non-individual claims); *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176, 186-89 (use of California "public policy" rule interpreting ambiguities against the drafter to impose class procedures on the parties where the contract did not expressly authorize class arbitration); *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 352 (California judicial rule declaring class-action waivers unconscionable); *Preston v. Ferrer* (2008) 552 U.S. 346, 353 (California Labor Code provision requiring an agency to hear certain disputes before arbitration); *Perry v. Thomas* (1987) 482 U.S. 483, 491 (California Labor Code provision requiring judicial forum for wage collection actions).

represents more of the same unlawful treatment of arbitration. It violates the FAA for two independent reasons.

First, SB 707 singles out arbitration agreements by name and imposes on the drafters of arbitration agreements mandatory, one-sided penalties and sanctions that do not apply to any contracts other than arbitration agreements. SB 707 thus violates Section 2 of the FAA and the "equal footing" principle it embodies.

For example, SB 707 treats *any* non-payment of arbitral fees by the drafting party—no matter the amount or the reasons for non-payment—as a per se "material breach of the arbitration agreement" that "waives [that party's] right to compel arbitration." Cal. Civ. Proc. Code § 1281.97(a).

Moreover, if the consumer or worker then elects to proceed in court notwithstanding his or her agreement to arbitrate, SB 707 purports to require a "sanction against the drafting party" in the form of an order "to pay the reasonable expenses" of the consumer or worker, "including attorney's fees and costs." *Id.* § 1281.99(a). And SB 707 further authorizes the court to impose a panoply of non-monetary and potentially case-dispositive sanctions, including orders "prohibiting the drafting party from conducting discovery in court"; "striking out the pleadings or parts of the pleadings of the drafting party"; "rendering a judgment by default against the drafting party"; or "treating the drafting party as in contempt of court." *Id.* § 1281.99(b).

If the consumer or worker elects arbitration instead, SB 707 mandates that the arbitrator order fee shifting and

authorizes the arbitrator to impose numerous other sanctions. *Id.* §§ 1281.97(b)(2), 1281.98(d).

The differential treatment of arbitration agreements is clear, both on the face of the statute and in practice. SB 707 not only creates a unique breach-of-contract-rule that applies solely to arbitration agreements, but also treats such agreements as a unique type of contract from which non-drafting parties need heightened protection in the event of non-performance (however slight or justified).

In the context of other contracts, California law treats the question whether a material breach has occurred as a case-specific question of fact and does not distinguish between the drafting and non-drafting parties. Prior to SB 707, courts took the same flexible approach to allegedly untimely payments of arbitration fees. SB 707's strict, mandatory penalties have worked a sea change in the law solely in the arbitration context, subjecting businesses to harsh sanctions no matter the reason for the non-payment or how slight the perceived violation (as this case and others illustrate).

SB 707's singling out of arbitration is the very unequal treatment that the FAA forbids.

Second, and for similar reasons, the FAA also preempts SB 707 because the California law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the FAA. *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz* (1941) 312 U.S. 52, 67). The stated goal of the California Legislature in imposing harsh and

"unforgiving" sanctions on businesses through SB 707 was to deter businesses from the "liberal use of binding arbitration provisions in contracts." Assem. Com. On Judiciary, Analysis of Sen. Bill No. 707 (2019-2020 Reg. Sess.) as amended May 20, 2019, p. 10. The statute's implementation of that goal embodies the very hostility to arbitration that the FAA was enacted to prevent.

ARGUMENT

The Federal Arbitration Act Preempts SB 707.

The United States Supreme Court has identified at least two ways in which the Federal Arbitration Act preempts state-law rules.

First, any state-law rule that "conflicts with § 2 of the Federal Arbitration Act . . . violates the Supremacy Clause." *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10; *see Preston*, 552 U.S. at 353 ("The FAA's displacement of conflicting state law is 'now well-established.'"). Section 2 of the FAA specifies that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation *of any contract*." 9 U.S.C. § 2 (emphasis added). Under Section 2, "courts must place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339; *accord Kindred*, 581 U.S. at 248; *DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, 54.

Second, the FAA preempts any state-law rule that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," as expressed in the FAA.

Concepcion, 563 U.S. at 352 (quoting *Hines*, 312 U.S. at 67). Such preempted state laws are void and unenforceable.

The FAA preempts SB 707 for both of these reasons—each of which is independently sufficient to render SB 707 unconstitutional under the Supremacy Clause.

A. SB 707 violates Section 2 of the Federal Arbitration Act.

Under Section 2's "equal footing" principle, the Federal Arbitration Act preempts state-law rules that "single out" arbitration agreements for disfavored treatment. *Kindred*, 581 U.S. at 253-54 & n.2. Moreover, as Justice Kagan explained for the *Kindred* Court, Section 2 not only prohibits States from facially discriminating against arbitration, but also prohibits States from achieving the same result "covertly," by "disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 251. The U.S. Supreme Court has reiterated that Section 2's "savings clause does not save defenses that target arbitration either by name or by more subtle methods." *Epic*, 584 U.S. at 508.

Here, the preemption analysis Is simpler than in *Kindred* or *Epic*. There is nothing "covert[]" or "subtle" about SB 707: It targets arbitration agreements by name. In that sense, it more closely resembles the Montana statute that the U.S. Supreme Court held preempted in *Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, which required contracts containing an arbitration clause to include a notice of the clause in underlined capital letters on the first page of the contract. *Id.* at 683. As Justice Ginsburg explained for the Court, that state statute "directly

conflicts with § 2 of the FAA" because it imposes "a special notice requirement not applicable to contracts generally," and instead governs "specifically and solely contracts 'subject to arbitration.'" *Id.* at 687.

1. SB 707 on its face departs from generally applicable contract principles.

Section 2's savings clause does not rescue SB 707 from preemption because SB 707 does not reflect generally applicable contract doctrine, but instead represents a stark departure from ordinary California contract principles.

First, California ordinarily treats "the question of whether a breach of an obligation is a material breach . . . [as] a question of fact." *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277 (collecting cases). That rule embodies the common-sense principle that the materiality of a breach is a case-specific and contract-specific determination, focusing on "the specific obligations undertaken by" the parties and the nature and "timing of a breach." *Whitney Inv. Co. v. Westview Dev. Co.* (1969) 273 Cal.App.2d 594, 601-02.

SB 707, by contrast, treats *any* failure by the drafting party to pay arbitration fees in full as an automatic material breach, as a matter of law—regardless of the underlying factual circumstances or whether the amount not paid is nominal or substantial.

Second, California ordinarily treats contracting parties equally in the context of a material breach by the other party: *either* party's "material breach" discharges "the other party" from "its duty to perform." *Brown*, 192 Cal.App.4th at 277 (citing 1

Witkin, Summary of Cal. Law, Contracts (10th ed. 2005) §§ 813, 814). SB 707, by contrast, applies only to breaches by the drafting party, and it obligates the drafting party to perform under the contract by paying arbitration fees regardless of whether the consumer or worker breached the contract first. SB 707 also applies even if the drafting party has a good-faith basis to dispute the arbitrability of the claims asserted against it, so that its non-payment of the arbitration fees associated with those claims would be justified until a court resolves the arbitrability issue.

Third, and relatedly, California ordinarily requires a plaintiff seeking to recover for a breach of contract to demonstrate that he or she has properly performed under the contract. *See* 1 Witkin, Summary of Cal. Law, Contracts (11th ed. 2020) § 873 (citing, *inter alia*, *Pry Corp. of Am. v. Leach* (1960) 177 Cal.App.2d 632, 639). Yet SB 707 allows even a consumer or worker who has breached an arbitration agreement to demand the drafting party's continued performance in the form of paying arbitration fees—and authorizes sanctions on a business that declines to perform in light of non-performance on the consumer's or worker's part.

For example, a consumer who breaches the arbitration agreement by filing a single arbitration claim that purports to be on behalf of hundreds of customers—conduct that is often expressly barred under the governing arbitration provision—could obtain enforcement of the arbitration agreement, notwithstanding such an express prohibition, if the targeted defendant fails to pay the full arbitration fees for the improper group arbitration.

As the dissent below summarized, SB 707 singles out arbitration agreements for disfavored treatment because "[n]o other contracts are voided on a hair-trigger basis due to tardy performance. Only arbitration contracts face this firing squad." 99 Cal.App.5th 1319, 1328 (Wiley, J., dissenting); *see also*, *e.g.*, *Hernandez v. Sohnen Enters., Inc.* (2024) 102 Cal.App.5th 222, 243 (SB 707 "violates the equal-treatment principle because it mandates findings of material breach and waiver for late payment that do not apply generally to all contracts or even to all arbitrations").[2]

2. SB 707 discriminates against arbitration in practice.

The burdens imposed by SB 707's singling out of arbitration agreements are real, not hypothetical.

The ordinary default rule of California contract law is that "time is not of the essence." *Leiter v. Handelsman* (1954) 125 Cal.App.2d 243, 250; *accord Belyea*, 637 F. Supp. 3d at 757 n.4. And even when parties contract around that default rule, "including a time is of the essence provision in a contract does not

[2] A growing number of federal district courts have concluded that SB 707 is preempted because it violates the FAA's equal-treatment principle and U.S. Supreme Court precedent interpreting that principle. *See*, *e.g.*, *Davis v. Movement Mortgage*, *LLC* (E.D. Cal. Dec. 10, 2024) 2024 WL 5294290, at *2; *Ding v. Structure Therapeutics, Inc.* (N.D. Cal. Oct. 29, 2024) --- F. Supp. 3d ----, 2024 WL 4609593, at *6; *Russell v. Siemens Indus. Software Inc.* (N.D. Cal. Oct. 21, 2024) 2024 WL 4545970, at *7-10; *Burgos v. Citibank, N.A.* (N.D. Cal. Aug. 16, 2024) 2024 WL 3875775, at *4-5; *Belyea v. Greensky, Inc.* (N.D. Cal. 2022) 637 F. Supp. 3d 745, 759.

always make untimely performance a breach." *Magic Carpet Ride LLC v. Rugger Inv. Grp., LLC* (2019) 41 Cal.App.5th 357, 367. In *Magic Carpet Ride*, for example, a payment eight days after the 90-day deadline that caused "no damages" did not automatically qualify as a material breach entitling the other party to terminate. *Id.* at 368-69; *see also id.* at 367-38 (collecting cases holding that time-is-of-the-essence provisions should not be strictly enforced if the delay is brief and strict enforcement would result in a harsh forfeiture).

As Golden State's brief explains (at 26-29), prior to SB 707, courts and arbitrators took the same flexible and case-specific approach to the timeliness of arbitration payments. For example, one court held that a three-week delay in paying arbitration fees was not a material breach entitling the plaintiff to avoid arbitration, because under ordinary California contract law "a short delay in performance typically does not result in a material breach excusing the other side from its obligations." *McLellan v. Fitbit, Inc.* (N.D. Cal. July 24, 2018) 2018 WL 3549042, at *5. The court nonetheless imposed a sanction of attorneys' fees, however, because the defendant paid the arbitration fees only after the court expressed concern at a hearing and the defendant lacked any justification for the delay. *Id.* at *6. Thus, the court fashioned a remedy based on the case-specific facts and the reasons for the delay.

Under SB 707, however, those considerations are irrelevant. As courts addressing the statute have recognized, SB 707's text provides "no exceptions" to the required findings of material

breach and waiver—and corresponding sanctions. *Espinoza v. Superior Ct.* (2022) 83 Cal.App.5th 761, 775-78 (reversing trial court decision declining to apply SB 707 because the drafting party was in "substantial compliance" with the arbitration agreement and the minor delay in payment was due to a "clerical error"); *see also*, *e.g.*, *Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, 1074-76 (SB 707 does not "permit an inquiry into the reasons for a drafting party's nonpayment"). The statute also overrides arbitration providers' discretion over the timing of fees, mandating that invoices are "due upon receipt" unless the parties expressly contract for a different rule. Cal. Civ. Proc. Code §§ 1281.97(a)(2), 1281.98(a)(2).

The bright-line rule created by SB 707 has repeatedly led to harsh and inequitable results, including in this case (*see* Opening Br. 15-17 & n.3). For example, one court held that even a defendant that sent a complete payment to the arbitration provider *within* the statutory 30-day deadline was in material breach, forfeited its contractual right to arbitration, and was subject to sanctions—because the court interpreted the statutory term "'paid'" to mean that the payment must be "received" by the deadline. *Doe v. Superior Ct.* (2023) 95 Cal.App.5th 346, 357-58, *as modified* (Sept. 28, 2023) (quoting Cal. Civ. Proc. Code § 1281.98(a)(1)). In another case, the 30th day for payment fell on January 1, and the court held that the statute did not permit an exception for defendant's one-day late payment based on a misapprehension of how far the deadline could be extended due to the New Year's

holiday. *Suarez v. Superior Court* (2024) 99 Cal.App.5th 32, 38-41.

SB 707's bright-line rule also makes irrelevant a business's good-faith basis to challenge either "whether the parties are bound by a given arbitration agreement" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy"—both issues that, unless the arbitration agreement provides otherwise, are "for a court to decide." *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84. SB 707 does not allow the business time to ask a court to resolve such questions of arbitrability before paying arbitration fees. By contrast, consumer or worker claimants are free to withdraw their claims without any penalty beyond a modest filing fee—even if the withdrawal occurs only after the business has paid arbitral fees with respect to those claims, and even if the withdrawal occurs because the business demonstrates that the claimants are illegitimate.

Recent experience suggests that the concerns about the legitimacy of consumer or worker claimants in arbitration are far from hypothetical—particularly when the arbitrations are driven by counsel seeking to maximize leverage through the imposition of arbitral fees. For example, the Seventh Circuit recently reversed an order compelling Samsung to participate in a series of arbitrations because the plaintiffs had failed to introduce any evidence that the claimants were even Samsung customers. *Wallrich v. Samsung Electronics America, Inc.* (7th Cir. 2024) 106 F.4th 609, 619. And in a recent matter involving Wells Fargo, a

process arbitrator dismissed 89% of claimants because plaintiffs' counsel could not attest, after more than a year, that those claimants were actual Wells Fargo customers with the account feature at issue who incurred the relevant fee within the statute of limitations.[3] Other companies have reported (with evidence) similar experiences.[4]

Other examples of the problems posed by SB 707 are not hard to imagine. A consumer or worker—perhaps at the encouragement of counsel—may fail to comply with an arbitration agreement's standard pre-arbitration notice and dispute resolution procedures designed to encourage the informal and amicable resolution of claims without the need for an adversarial proceeding. Or a consumer or worker may initiate an improper class or representative arbitration—the types of arbitrations that courts

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[3] *See* Decl. of Alicia Baiardo ¶¶ 31-37 & Exs. 45-54, *Penuela v. Wells Fargo & Co.* (N.D. Cal. May 28, 2024), No. 24-cv-766, Dkt. 21, 21-2 (attaching claimants' submission and process arbitrator's order).

[4] *See, e.g.*, Decl. of Roger Cole ¶¶ 21-22, *In re Intuit Free File Litig.* (N.D. Cal. Dec. 7, 2020) No. 19-cv-2546, Dkt. 192 (noting that claimants' counsel withdrew 8,282 arbitrations after defendant demonstrated that the claimants were either not customers or never paid the disputed fee); *In re CenturyLink Sales Pracs. & Sec. Litig.* (D. Minn. June 29, 2020) 2020 WL 3513547, at *2-3 (reporting that the defendant "could not identify any potential customer account that could be connected with some" arbitration claimants, some of whom even "claimed to receive services at addresses in states in which [the defendant] does not provide services"); *Abernathy v. DoorDash, Inc.* (N.D. Cal. 2020) 438 F. Supp. 3d 1062, 1065 (determining that 869 arbitration claimants had failed to provide sufficient evidence to allow the court to conclude that they had arbitration agreements with the defendant).

have enjoined when they are prohibited by an arbitration agreement.[5]

Yet in all of these scenarios, SB 707 obligates the business to pay the arbitration fees in full, on pain of massive sanctions, and with no guarantee of recouping the fees that it pays for even illegitimately filed arbitrations.

3. Lower courts' arguments against preemption are unpersuasive.

The rationales offered by courts that have concluded that Section 2 of the FAA does not preempt SB 707 are all unpersuasive.

Some courts have reasoned that Section 2 of the FAA has no role to play because SB 707 is triggered only after the parties' arbitration agreement has been enforced in the first instance and does not "automatically invalidate arbitration agreements." *Espinoza*, 83 Cal.App.5th at 783-84 (citing *Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621, 642); *see also*, *e.g.*, *Postmates Inc. v. 10,356 Individuals* (C.D. Cal. Jan. 19, 2021) 2021 WL 540155, at *7-8 (similar).

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[5] For example, one law firm filed copycat arbitrations on behalf of over 1,000 claimants seeking to block or impose conditions on a merger. Every court to consider the issue held that the arbitrations were improper class or representative arbitrations that violated the arbitration agreement. *See*, *e.g.*, *AT&T Mobility LLC v. Princi* (D. Mass. Dec. 2, 2011) 2011 WL 6012945, at *1; *AT&T Mobility LLC v. Bernardi* (N.D. Cal. Oct. 26, 2011) 2011 WL 5079549, at *13; *AT&T Mobility LLC v. Smith* (E.D. Pa. Oct. 7, 2011) 2011 WL 5924460, at *8; *AT&T Mobility LLC v. Gonnello* (S.D.N.Y. Oct. 7, 2011) 2011 WL 4716617, at *4; *AT&T Mobility LLC v. Bushman* (S.D. Fla. Sept. 23, 2011) 2011 WL 5924666, at *2.

That rationale is wrong. To begin with, SB 707 does render the arbitration agreement unenforceable by the drafting party, because it provides that non-payment of arbitration fees "waives [that party's] right to compel arbitration" (Cal. Civ. Proc. Code § 1281.97(a)), even if the drafting party would otherwise be entitled to enforce the contract under general principles of California contract law. SB 707 therefore makes "it harder to enforce arbitration agreements." *Hernandez*, 102 Cal.App.5th at 243.

These lower courts' rationale that a *consumer or worker* can still elect to proceed in arbitration (*e.g.*, *Gallo*, 81 Cal.App.5th at 642) ignores that SB 707 makes arbitration agreements unenforceable by the *drafting party*—a one-sided rule that does not apply to contracts in general. Section 2 of the FAA prohibits that result. The lower courts' rationale also ignores that when a consumer or worker elects to remain in arbitration, SB 707 still imposes mandatory sanctions on the drafting party, including fee shifting. *See* Cal. Civ. Proc. Code § 1281.97(b)(2), 1281.98(d).

Moreover, and more fundamentally, these lower courts' narrow reading of Section 2 would leave the FAA's "provisions rendered helpless to prevent even the most blatant discrimination against arbitration." *Kindred*, 581 U.S. at 255. The respondents in *Kindred* similarly argued that the FAA cares only about state-law rules governing the enforceability of arbitration agreements, and therefore the FAA did not apply to a Kentucky rule affecting agents' authority to enter into an arbitration agreement in the first place. *Id.* at 254. That argument sliced the FAA's "equal-footing principle" far too finely, Justice Kagan explained

for the Court, because "States could just as easily declare *everyone* incompetent to sign arbitration agreements" and, under the respondents' reading, avoid preemption on the ground that the rule affects "only formation." *Id.* at 254-55.

The California Legislature sought to avoid FAA preemption of AB 51 based on a similar rationale, by structuring AB 51 to impose criminal and civil sanctions on the act of entering into an arbitration agreement but not to preclude enforcement of the agreement once formed. *See* Cal. Labor Code § 432.6(f). That effort to avoid preemption failed, the Ninth Circuit explained, because AB 51's "penalty-based scheme to inhibit arbitration agreements before they are formed" still "singles out arbitration provisions as an exception to generally applicable law" governing contracts and therefore "violates the equal-treatment principle inherent in the FAA." *Chamber of Commerce*, 62 F.4th at 487 (quotation marks omitted).

The U.S. Supreme Court's decision in *Preston* further confirms that the FAA is concerned with more than just the enforceability of arbitration agreements. In *Preston*, the California state statute allowed enforcement of arbitration agreements and "merely postpone[d]" arbitration until after an administrative adjudication. 552 U.S. at 357-58. Nonetheless, the statute impermissibly conflicted with the FAA. *Id.*

Equally unavailing is the related rationale that SB 707 merely sets forth "procedural requirements" to govern the conduct of the arbitration proceedings. *Espinoza*, 83 Cal.App.5th at 783 (citing *Gallo*, 81 Cal.App.5th at 643).

That characterization of SB 707 as "a 'procedural' rule makes no difference to the equal-treatment inquiry." *Belyea*, 637 F. Supp. 3d at 758. In explaining that California could not insist on the availability of class procedures in arbitration, the U.S. Supreme Court made clear that "States cannot require a procedure that is inconsistent with the FAA." *Concepcion*, 563 U.S. at 351; *see also id.* at 346 (FAA applies "'notwithstanding any state substantive or procedural policies to the contrary'") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 24). The Court further noted that "States may not superimpose on arbitration" other types of procedures inconsistent with the FAA, such as requiring the parties to "arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation." *Id.* at 351; *see also id.* at 342 (observing that a rule requiring the parties "to abide by the Federal Rules of Evidence" or to allow for ultimate disposition by a jury would violate Section 2 of the FAA).

California courts have likewise recognized that state arbitration procedures may not "conflict with or defeat the rights Congress granted in the FAA." *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 632 (citing *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal. 4th 394, 409; *Muao v. Grosvenor Properties, Ltd.* (2002) 99 Cal.App.4th 1085, 1092).

SB 707 is not merely procedural in any event. It creates a new, arbitration-specific rule for material breach—a substantive principle of California contract law. *See* pages 21-23, *supra*. And if SB 707 is merely procedural, then courts should not be

applying the statute when the parties' contract selects the FAA. *See* Opening Br. 51-55; *cf. Gallo*, 81 Cal.App.5th at 642, 645 (repeatedly emphasizing that the parties' arbitration agreement expressly "incorporated the 'California Arbitration Act'"); *Espinoza*, 83 Cal.App.5th at 785 (applying the CAA "by default" because the contract did not expressly select the FAA). As this Court recently confirmed, the "CAA's procedural rules" do not apply when the parties have "expressly agreed that the FAA's procedural rules apply" instead. *Quach v. California Commerce Club, Inc.* (2024) 16 Cal. 5th 562, 576.

Finally, some lower courts have opined that claimant consumers or workers "cannot 'abuse' arbitration agreements the way drafters of arbitration agreements" can. *Postmates*, 2021 WL 540155, at *9. But for the reasons detailed above (at 26-28 & nn.3-5), that assertion is wrong. In all events, SB 707 "is not limited . . . to circumstances of strategic non-payment" or other abuses. *Hernandez*, 102 Cal.App.5th at 235. It instead inflexibly treats *all* instances of non-payment by the drafting party as a material breach and imposes severe sanctions on the drafting party, "even in cases of minor, inadvertent, or inconsequential delay." *Id.* at 235, 244.

* * *

In short, because California law does not subject non-arbitration contracts to the harsh and one-sided sanctions contained in SB 707, that statute reflects a rule of state contract law designed "in a fashion that disfavors arbitration," and it is

preempted. *Concepcion*, 563 U.S. at 341; *see also Kindred*, 581 U.S. at 251.

B. SB 707 interferes with the purposes and objectives of the Federal Arbitration Act.

These anti-arbitration aspects of SB 707 confirm that the statute is preempted by the Federal Arbitration Act for a second reason: SB 707 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" expressed in the Act. *Concepcion*, 563 U.S. at 352 (quoting *Hines*, 312 U.S. at 67).

Congress enacted the Federal Arbitration Act in 1925 "in response to judicial hostility to arbitration." *Viking River*, 596 U.S. at 649; *see Allied-Bruce Terminix Cos. v. Dobson* (1995) 513 U.S. 265, 272 (the FAA "seeks broadly to overcome judicial hostility to arbitration agreements"). The U.S. Supreme Court has made clear that this principle extends to legislative hostility as well: the FAA "'foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.'" *Preston*, 552 U.S. at 353 (quoting *Southland*, 465 U.S. at 16). Thus, any state-law rule, "whether of *legislative* or judicial origin," that runs afoul of the FAA is preempted. *Perry*, 482 U.S. at 492 n.9 (emphasis added).

By singling out only the drafters of arbitration contracts for unique and enormous penalties, SB 707 embodies the very hostility that the FAA was designed to eliminate. The effect, and the stated purpose, of SB 707 is to discourage businesses from forming and enforcing arbitration agreements with their customers

and workers through arbitration-specific legal rules that open the door to draconian sanctions.

Indeed, there is no need to speculate about that point, because the California Legislature admitted as much. The Assembly Committee on the Judiciary stated that the statute's "unforgiving" sanctions are "justified" to make "drafting parties reconsider their liberal use of binding arbitration agreements in contracts." Analysis of Sen. Bill No. 707, *supra*, at 10.

The Committee made plain its dislike of arbitration by characterizing it as a "controversial form of dispute resolution" (*id.*)—but that view is "far out of step" with Congress's endorsement of arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30 (quotation marks omitted). Courts routinely look to California legislative history of this kind as confirmatory evidence of the effect of the statutory text. *See, e.g.*, *Chamber of Commerce*, 62 F.4th at 480; *Gonzales v. CarMax Auto Superstores, LLC* (9th Cir. 2016) 840 F.3d 644, 652 & n.8; *In re Findley* (9th Cir. 2010) 593 F.3d 1048, 1053.

Moreover, as explained above (at 24-28), SB 707 penalizes any business that fails to pay arbitration fees in full, regardless of whether the business has a good-faith basis to challenge the arbitrability of the claims or to challenge whether the consumer or worker has complied with his or her own obligations under the contract. The statute therefore increases the costs of enforcing arbitration agreements. And the statute invites misuse of the arbitration process by enterprising plaintiffs' lawyers who know that businesses will feel obligated to pay fees even if they have

reason to believe that the claimant may not actually be a customer, is not asserting an arbitrable claim, or has failed to comply with any necessary prerequisites to initiating an arbitration.

The Ninth Circuit determined in the context of Assembly Bill 51 that such a "deterrent effect" on a business's "willingness to enter into an arbitration agreement" meant that the California statute was "antithetical to the FAA's liberal federal policy favoring arbitration agreements." *Chamber of Commerce*, 62 F.4th at 487 (emphasis added). AB 51 therefore stood as an obstacle to the "FAA's purpose" of "further[ing] Congress's policy of encouraging arbitration" and was preempted by the FAA. *Id.* The same is true of SB 707.

Decisions from other federal appellate courts are in accord. The United States Court of Appeals for the First Circuit has held, for example, that "[a] policy designed to prevent one party from enforcing an arbitration contract or provision by visiting a penalty on that party is, without much question, contrary to the policies of the FAA." *Securities Indus. Ass'n v. Connolly* (1st Cir. 1989) 883 F.2d 1114, 1122-24 (holding that the FAA preempts a Massachusetts state-law allowing state officials to revoke the licenses of broker-dealers who required customers to sign pre-dispute arbitration agreements). And the U.S. Court of Appeals for the Fourth Circuit has expressly endorsed *Connolly*, agreeing that the FAA bars state-law rules that "discourage" arbitration, not just those that "prohibit" it outright. *Saturn Distrib. Corp. v. Williams* (4th Cir. 1990) 905 F.2d 719, 722-24.

The court below thought that SB 707 did not interfere with the purposes and objectives of the FAA because, in its view, SB 707's provisions "*further*—rather than frustrate—the objectives of the FAA" by encouraging speedy resolution of the parties' disputes. 99 Cal.App.5th at 1325-26 (quoting *Gallo*, 81 Cal.App.5th at 638)). That myopic conclusion ignores the impact of SB 707 on whether parties enter into arbitration agreements in the first place. By definition, the *drafting* party is the party that decides whether to include an arbitration provision in its contracts. And by imposing harsh, one-sided sanctions on drafting parties, SB 707 plainly has a deterrent effect on the use of arbitration agreements in California—the very purpose of the California Legislature in enacting the statute.

Moreover, as one court aptly put it, SB 707 "is a *stick*—failure to pay within 30-days constitutes material breach of the arbitration agreement and waiver of the right to enforce the contract—not a *carrot* to incentivize arbitration." *Belyea*, 637 F. Supp. 3d at 757 (emphasis added). And the only "benefit" it provides "is simply not being hit by the stick—*i.e.*, losing a contractually binding right to arbitrate disputes." *Id.*

In sum, SB 707 implements the Legislature's expressed goal of creating a disincentive for entering into arbitration agreements. The FAA forbids that result.

CONCLUSION

The Court should reverse the decision below.

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

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According to the word count function in Word for Microsoft 365, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.520(c)(3), contains 5,838 words, and therefore complies with the 14,000-word limit contained in Rule 8.520(c)(1).

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CERTIFICATE OF SERVICE

I, Alec E. Hemingway, declare as follows: I am over the age of eighteen years, and I am not a party to the action. My business address is: 1999 K Street NW, Washington, D.C. 20006.

On February 10, 2025, I served the foregoing document on the parties stated below, by the following means of service:

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